86-655

No. 86-

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Respondent,

v.

ROBERT L. ISRAEL, et. ux. and

C. WILLIAM BAILEY, et. ux.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit has the authority to expand the congressional limitations on federal court jurisdiction by affirming the dismissal of a Rule 60 independent action to set aside a void judgment, rendered without jurisdiction, on the pretext that, while the initial refusal to remand to the state court was admittedly erroneous, such error became the law of the case precluding the relief expressly provided by Rule 60.

PARTIES

Harriet M. Gould, plaintiff, a Washington citizen; Mutual Life Insurance Company of New York (herein referred to as MONY, its public relations acronym), a New York corporation, co-defendant; the marital community of Robert L. Israel and wife, co-defendants, Washington citizens; the marital community of C. William Bailey and wife, co-defendants, Washington citizens.

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IN THE

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October Term, 1986

No. _____

HARRIET M. GOULD,
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MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
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v.

ROBERT L. ISRAEL, et. ux., and
C. WILLIAM BAILEY, et. ux.,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Harriet M. Gould respectfully prays for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINION BELOW

The opinion of the Court of Appeals (App. A1-A13) is reported at 790 F.2d 769 (1986).

II. JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is dated May 28, 1986. Petition for Rehearing was timely filed and denied on July 17, 1986. (See Appendix A-14). The ninety days within which this Petition must be filed expires on October 15, 1986. (28 U.S.C. 2101(c)). The jurisdiction of this Court to consider this Petition and to hear the petitioner's appeal is found in 28 U.S.C. §1254.

III. STATUTES AND RULES INVOLVED

1. **28 U.S.C. §1332;** Diversity of citizenship; amount in controversy; costs. Reproduced in Appendix p. A-15.

2. **28 U.S.C. §1441;** Actions removable generally. See Appendix p. A-15-16 .

3. **28 U.S.C. §1447;** Procedure after removal generally. See Appendix p. A-16 .

4. **28 U.S.C. §2101(c);** Time for filing certiorari. See Appendix p. A-16-17 .

5. **Rule of Civil Procedure No. 60.** See Appendix p. A-17-18.

IV. CONCISE STATEMENT OF THE CASE

This Petition involves an independent suit in equity to set aside a void judgment under Rule 60.

Petitioner's original action in the state court alleged in a single nonseverable claim, joint liability of two non-diverse defendants (Israel and Bailey) and one diverse defendant (Mutual Life Insurance Company of New York, herein referred to as MONY, its public relations acronym). After all parties were served, the state court dismissed the non-diverse defendants on the merits over vigorous objections by petitioner. Petitioner perfected an appeal to the State Court of Appeals the same day the involuntary dismissal of the non-diverse defendants was entered. MONY removed to the United States District Court. Petitioner moved for remand pointing out lack of federal jurisdiction on the ground the dismissal of the non-diverse defendants was involuntary and that the dismissal was pending on appeal. Despite the fact that the District

Court did not have jurisdiction (Whitcomb v. Smithson, 175 U.S. 635, and others), remand was denied. The District Court later entered judgment of dismissal of petitioner's claim against MONY, from which petitioner timely appealed to the Ninth Circuit, intending to rely upon the lack of federal court jurisdiction as the principal error to set aside the void judgment.

The pre-briefing conference attorney from the Ninth Circuit rebuked petitioner's attorney for even mentioning the jurisdictional issue, assuring petitioner that all judges had the absolute duty to sua sponte review the record for jurisdiction. To make sure petitioner would not have enough pages to present the jurisdictional issue in her brief, the Ninth Circuit pre-briefing attorney reduced the pages authorized for petitioner's brief from the 50 provided by rule to 35. In obedience to the Ninth Circuit's pre-briefing attorney's instructions, and in reliance upon this Court's repeated assertions that all federal courts have the duty to

sua sponte search the record for jurisdiction, the jurisdictional issue was not raised in petitioner's brief.

While the appeal to the Ninth Circuit from the dismissal of plaintiff's claim against MONY was pending, the State Court of Appeals reversed the dismissal of the non-diverse defendants and remanded to the state court for trial. (Gould v. MONY, et. al., 37 Wn.App. 756, 683 P.2d 207 (1984)). The Ninth Circuit was immediately notified of the State Court of Appeals' reversal of the involuntary dismissal of the non-diverse defendants. The Ninth Circuit nevertheless affirmed the District Court's dismissal of MONY, completely ignoring the judgment was void for lack of jurisdiction. Gould v. Mutual Life Insurance Company of New York, 735 F.2d 1165 (9th Cir.-1984). Certiorari denied 105 S.Ct. 2023 (1984).

While Petition for Certiorari was pending, petitioner moved in the District Court for remand pursuant to 28 U.S.C. §1447 again

pointing out the lack of federal jurisdiction. After certiorari was denied the 28 U.S.C. §1447 motion was denied. Petitioner then instituted an independent suit in equity to set aside the void judgment pursuant to Rule 60. Respondent did not deny the allegations of the suit in equity but moved to dismiss on the ground of waiver of jurisdictional requirements. The District Court dismissed the suit in equity. Petitioner appealed from both orders. Gould v. MONY, 790 F.2d 769 (1986). See Appendix.

The Ninth Circuit's opinion admits the District Court's flagrant error in failing to remand as required by Whitcomb v. Smithson, 175 U.S. 635 and its progeny. Without mentioning its own dereliction of duty to search the record for lack of jurisdiction, the Ninth Circuit affirmed the District Court on the ground that the failure of both the District Court and the Ninth Circuit to recognize lack of jurisdiction on the first appeal became the law of the case, precluding the very relief provided by Rule 60.

The posture of petitioner's complaint has not changed since the filing of her complaint in the state court alleging joint liability of the non-diverse and diverse defendants in a single non-severable cause of action. Petitioner contends to this day that the evidence will prove all defendants are jointly liable to her for her damages.

The Ninth Circuit's reference to subject matter jurisdiction is a red herring. Congress has not given federal courts jurisdiction of the subject matter of this action in the absence of complete diversity between petitioner and all defendants. As a result, federal court jurisdiction cannot be found in the complaint. The action could not be filed in the federal court and cannot be removed, hence the judgment under attack is void.

V. JURISDICTION IN FEDERAL COURT OF FIRST INSTANCE

The only jurisdiction the District Court had upon being presented with the Petition for Removal and the Motion for Remand, was to grant the remand and impose sanctions against respondent (Pravic v. U.S. Industries-Clearing, 109 FRD 620 (E.D. Mich. 1986). The complaint alleged joint liability of diverse and non-diverse defendants in a single claim. Those allegations foreclosed removal. Whitcomb v. Smithson, 175 U.S. 635, 637; 20 S.Ct. 248; 48 L.Ed. 203; Kansas City Suburban Belt Ry. Co. v. Herman, 187 U.S. 65; 23 S.Ct. 24; 47 L.Ed. 76; Alabama Great Southern Ry. Co. v. Thompson, 200 U.S. 206; 26 S.Ct. 161; 50 L.Ed. 441; Lathrop v. Int. Const. & Imp. Co., 215 U.S. 246; 30 S.Ct. 76; 54 L.Ed. 177; American Car & Foundry Co. v. Kettelhake, 236 U.S. 311; 35 S.Ct. 335; 59 L.Ed. 594; Great Northern Ry. Co. v. Alexander, 246 U.S. 276; 38 S.Ct. 237; 62 L.Ed. 13. Jurisdiction for the Rule 60 independent suit is in 28 U.S.C. 1332.

REASONS FOR GRANTING THE WRIT

Using a shotgun approach the Ninth Circuit relies on eight theories to justify expanding federal court jurisdiction to avoid setting aside a judgment, admittedly entered without congressionally approved jurisdiction. As will now be pointed out, each of these theories either presents a departure from the accepted and usual course of judicial proceedings or so far sanctions such departure by a lower court as to call for an exercise of this Court's power of supervision, or, decides an important question of federal law which should be, but has not been, settled by this Court, or, decides a federal question in a way in conflict with the applicable decisions of this Court.

Ninth Circuit Theory:

1. State court involuntary dismissal of non-diverse defendants changes the posture of the complaint (even though the state court dismissal is on appeal at the time of entry of judgment and

is reversed before the Circuit affirms the District Court).

This is a new theory directly contradicted by the decisions of this Court cited in section V hereof, all of which hold that the allegations of the complaint as originally filed control jurisdiction, and that neither an appeal from, or the reversal of, a state court dismissal of non-diverse defendants can create the diversity necessary to support federal court jurisdiction. This is demonstrated by Judge Cohn in the recent decision of Pravic v. U.S. Industries, 109 F.R.D. 620 (E.D. Mich.-1986) in which a diverse defendant was assessed sanctions for petitioning for removal stating "There is no basis in law for the removal" (109 F.R.D. 621) and commenting " . . . that diversity achieved by virtue of involuntary dismissal of a resident does not allow removal." Judge Cohn's decision demonstrates the usual and accepted course of judicial proceedings from which the Ninth Circuit has departed.

2. Ninth Circuit Theory:

Interlocutory appeal from denial of motion to remand is prerequisite for setting aside void judgment.

This is a new invention. The usual and accepted course of judicial proceedings is set out in Libhart v. Santa Monica Dairy, 592 F.2d 1062 (9th Cir.-1979):

> "At the core of the federal judicial system is the principle that the federal courts are of limited jurisdiction. A review of the federal court's jurisdiction is a threshold question which must be answered prior to the disposition of each case before it. Even though not raised by the parties, lack of jurisdiction may be considered by the Court at any stage of the proceedings." (Emphasis Supplied).

It was in reliance of this principle that the pre-briefing attorney from the Ninth Circuit directed petitioner not to raise the issue of jurisdiction on her first appeal. The failure of the Ninth Circuit to obey Libhart was a departure from the usual and accepted course of judicial proceedings.

Lack of jurisdiction can be raised at any time.

3. Ninth Circuit Theory:

Subject matter jurisdiction eliminates requirement on diversity.

This is a complete departure from the usual and accepted judicial procedure. There is no federal subject matter jurisdiction presented here. In the absence of complete diversity between plaintiff and all defendants, there can be no federal jurisdiction, unless specifically authorized by Congress. None has been so authorized. The subject matter argument is a complete red herring invented by MONY and the Ninth Circuit.

4. Ninth Circuit Theory:

Jurisdiction requirements were waived.

This is contrary to the decisions of this Court on a very important federal question going to the very heart of the federal judicial system.

5. Ninth Circuit Theory:

Federal court jurisdiction exists

until the state court dismissal of the non-diverse defendants is overturned on appeal.

This is contrary to all the decisions of this Court as cited in section V hereof. Under the decisions of this Court cited in section V, an appeal from the state court dismissal of the non-diverse defendants would not be necessary to deprive the federal court of jurisdiction. The issue of whether federal jurisdiction flits in and out with the results of state court appeals, should be decided by this Court and all decisions to the contrary overruled.

6. Ninth Circuit Theory:

Failure of the Ninth Circuit to perform its duty to sua sponte search the record for District Court jurisdiction in the first appeal precludes setting aside the judgment under Rule 60.

This is contrary to the usual and accepted course of judicial proceedings and in con-

flict with the decisions of this Court. Lack of jurisdiction can be raised at any time, even after judgment. Libhart. Failure of the Ninth Circuit to sua sponte recognize lack of federal court jurisdiction when considering the first appeal does not create federal court jurisdiction.

7. Ninth Circuit Theory:

Grubbs/American Fire rule creates federal jurisdiction when the District Court judgment is entered before the state court dismissal of the non-diverse defendants is overturned on appeal.

This is contrary to the decisions of this Court cited in section V hereof and is also a complete misstatement of the rule. An appeal from the state court dismissal of the non-diverse defendants is not required to preclude removal. Only some voluntary act by plaintiff can create the diversity necessary to grant federal court juris-

diction. The posture of this case never changed. There would not have been federal court jurisdiction had the case been filed in that same posture at the time judgment was entered.

8. Ninth Circuit Theory:

Law of the case and res judicata doctrines preclude vacating the judgment.

This is contrary to the usual course of judicial proceedings and the applicable decisions of this Court. The independent Rule 60 action is a direct attack on a void judgment. The Ninth Circuit opinion points out all the reasons why the District Court did not have jurisdiction at any time but denies the relief specifically called for by Rule 60. This is an important federal question which should be decided by this Court.

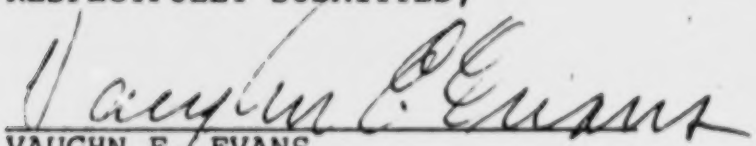
CONCLUSION

The Ninth Circuit's shotgun treatment demonstrates the uncertainty of its result. The federal question presented is

important and should be decided by this Court. Federal jurisdiction should not rest upon the uncertainties and contradictions between the decisions of this Court and in Pravic on the one hand and the Ninth Circuit decision on the other.

DATED this 7th day of October, 1986.

RESPECTFULLY SUBMITTED,



VAUGHN E. EVANS
Attorney for Petitioner

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRIET M. GOULD, an unremarried widow,
Plaintiff-Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a foreign corporation,
Defendant-Appellee.

Nos. 85-3833
85-4163

D.C. Nos.
CV 84-230R
CV 85-837M

OPINION

Argued and Submitted
May 7, 1986—Seattle, Washington

Filed May 28, 1986

Before: Eugene A. Wright and J. Blaine Anderson, Circuit Judges, and M. D. Crocker,* Senior District Judge.

Opinion by Judge Wright

Appeal from the United States District Court
for the Western District of Washington
Walter T. McGovern, Chief Judge, and
Barbara J. Rothstein, District Judge, Presiding

*Of the Eastern District of California.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUMMARY

Courts and Procedure

Appeal from denial of motion for remand to state court. Affirmed.

The appeal arises from appellant Gould's suit claiming a violation of her rights under the Washington Consumer Protection Act by appellee Mutual Life Insurance Company of New York (MONY) and two Washington attorneys. The court dismissed the action as to the two attorneys and Gould appealed. MONY then had the action removed to federal district court on diversity grounds. Gould's motion to have the matter remanded to state court was denied and the court entered summary judgment for MONY.

[1] The filing of a notice of appeal divests the district court of jurisdiction. Where the underlying judgment has been appealed, denial of a motion for relief from that judgment is a nonappealable order. [2] The proper procedure, once an appeal has been taken, is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case. [3] Although cases support the proposition that the district court never regains jurisdiction in the absence of a remand, the better approach is that the district court may consider motions to vacate once the mandate has issued. [4] The Supreme Court had denied certiorari by the time the district court ruled on the motion. Thus, Gould need not have applied to this court or the Supreme Court for either a remand or a recall of the mandate in order for the district court to have had jurisdiction to consider the motion and the independent action. [5] Federal courts look only to a plaintiff's pleadings to determine removability. When an action is removed based on diversity, complete diversity, determined from the face of the complaint, must exist at removal. The district court erred in

denying Gould's remand motion because dismissal of the two Washington attorneys was not voluntary. [7] Because Gould did not take an interlocutory appeal of the denial of her remand motion, her claim fails. When final judgment was entered, only a diverse defendant remained because the non-diverse defendants had been dismissed and that dismissal had not yet been overturned on appeal. [8] Lower federal courts, while of limited jurisdiction, have the authority to determine their own jurisdiction. In Gould's initial appeal, the court considered whether the district court lacked subject matter jurisdiction and rejected the contention by denying rehearing. [9] Gould has shown nothing to justify the district court's ignoring the implication, arising from the denial of rehearing, that it was bound by this determination that its exercise of jurisdiction was proper.

COUNSEL

Vaughn E. Evans, Seattle, Washington, for the plaintiff-appellant.

Robert M. Kraft and Frank Draper, Seattle, Washington, for the defendant-appellee.

OPINION

WRIGHT, Circuit Judge:

At issue are the competing concerns of the finality of judgments and the limited subject matter jurisdiction of federal courts. Mrs. Gould asks this court to reconsider its previous determination of subject matter jurisdiction. She contends that removal was improper and the district court lacked subject matter jurisdiction. Her contentions fail because of the procedural posture of the case: the district court has entered

final judgment against her; and the issues, including subject matter jurisdiction, have been litigated all the way to the Supreme Court. She would continue the controversy by having the case remanded to the state court. Having determined that our prior determination was correct, we hold that the district court was bound by the law of the case.

BACKGROUND

We summarized the facts in our earlier opinion:

> In May 1976, Vick Gould was found shot to death in a public park in Bellevue, Washington. He was killed by a bullet that entered through the base of his skull. Vick was insured under a life insurance policy issued by Mutual Life Insurance Company of New York ("MONY"). The policy insured against accidental death, but excluded death by suicide. Plaintiff Harriet Gould, the insured's widow and beneficiary of the policy, submitted a claim to collect the $25,000 proceeds of the policy. MONY refused payment, claiming that the death was by suicide.
>
> Plaintiff then brought an action in state court to enforce the policy. MONY raised the policy's suicide exclusion clause as an affirmative defense. The jury returned a verdict for plaintiff and, on appeal, the Washington Supreme Court affirmed. *Gould v. Mutual Life Insurance Co.*, 95 Wash. 2d 722, 629 P.2d 1331 (1981) (en banc).

Gould v. Mutual Life Insurance Co. of New York, 735 F.2d 1165, 1166 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2023 (1985).

Having prevailed on her policy claim, Gould, a Washington resident, sued in state court under the Washington Consumer Protection Act against two Washington attorneys and

MONY, a New York corporation. The court dismissed the claims against the two attorneys, and Gould appealed.

While the appeal was pending, MONY removed the action. The district judge denied Gould's motion for remand and entered summary judgment for MONY.

Gould appealed. After that appeal was submitted, the Washington Court of Appeals reversed the state trial court's dismissal of the two Washington attorneys. *Gould v. Mutual Life Insurance Co. of New York*, 37 Wash. App. 756, 683 P.2d 207 (1984) (filed in April 1984).

In June 1984, we affirmed the summary judgment for MONY. *Gould v. Mutual Life Insurance of New York*, 735 F.2d 1165 (9th Cir. 1984). Gould petitioned for rehearing and suggested rehearing en banc, raising for the first time on appeal the district court's removal jurisdiction. After calling for a response by MONY, we denied Gould's petition for rehearing and suggestion for rehearing en banc.[1]

Gould then petitioned for certiorari, again raising the district court's removal jurisdiction. While the petition was pending, Gould moved in the district court for remand. On April 15, the Supreme Court denied certiorari. *Gould v. Mutual Life Insurance Co. of New York*, 105 S.Ct. 2023 (1985). On April 17, the district court denied the remand motion. Gould appealed (Appeal No. 85-3833).

Gould next filed an independent federal action, alleging that the judgment for MONY in the previous action was void for lack of subject matter jurisdiction. The district court dismissed the action on MONY's motion. Gould appealed (Appeal No. 85-4163).

[1]In August 1984, before this court denied Gould's rehearing petition and suggestion, the state trial court entered summary judgment for the two Washington attorneys. The judgment is final, and the Washington Supreme Court has denied Gould's petition for review.

STANDARD OF REVIEW

Removal is a question of federal subject matter jurisdiction, reviewable de novo. *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 931 (9th Cir. 1986) (citing *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir. 1986)). "The burden of establishing federal jurisdiction falls on the party invoking removal." *Id.* (citing *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984), *cert. denied*, 106 S.Ct. 180 (1985)).

Motions to vacate under Rule 60(b) are not a substitute for appeal, however, and are usually reviewed for abuse of discretion. *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985); *Bruce v. United States*, 759 F.2d 755, 759 (9th Cir. 1985). "[R]eview of a Rule 60(b) motion may encompass a claim that the district court acted in excess of its jurisdiction . . . ." *Cel-A-Pak v. California Agr. Labor Relations Board*, 680 F.2d 664, 668 (9th Cir.) (citing *United States v. Russell*, 578 F.2d 806, 807 (9th Cir. 1978)), *cert. denied*, 459 U.S. 1071 (1982). A court considering a motion to vacate a judgment, which it finds void for lack of jurisdiction, has no discretion to hold that the judgment should not be set aside. *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985).

ANALYSIS

1. *District Court Jurisdiction After Appeal of Final Judgment*

Initially, MONY contends that once the original notice of appeal was filed, the district court was without jurisdiction to consider Gould's postjudgment contentions.

[1] The filing of a notice of appeal divests the district court of jurisdiction. *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984) (citing *Long v. Bureau of Economic Analysis*, 646 F.2d 1310 (9th Cir.), *judgment vacated on other grounds*, 454 U.S. 934 (1981); *Smith v. Lujan*, 588 F.2d 1304 (9th Cir.

1979)). Unless the appellate court remands to the district court, the latter is without jurisdiction to consider motions to vacate judgment. *See Bruce v. United States*, 759 F.2d 755, 757 (9th Cir. 1985) (citing *Scott v. Younger*, 739 F.2d at 1466).

Indeed, we have held that, where the underlying judgment has been appealed, denial of a motion for relief from that judgment is a nonappealable order. *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381, 1386 n.2 (9th Cir.), *cert. denied*, 105 S.Ct. 397 (1984); *see also Scott*, 739 F.2d at 1466 (denial of "request to 'entertain' a motion to vacate . . . is interlocutory in nature and not appealable."); *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir.) (not appealable but court construes as request for remand), *cert. denied*, 429 U.S. 896 (1976). *But cf. Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir.) (recognizing that other circuits allow *denial* of motion), *judgment vacated on other grounds*, 454 U.S. 934 (1981).

[2] The proper procedure, once an appeal has been taken, is to " 'ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case.' " *Scott*, 739 F.2d at 1466 (quoting *Long*, 646 F.2d at 1318). If that route is not taken, an appeal of the denial of the motion to vacate is subject to dismissal. *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979).

Gould's motion for remand at issue in No. 85-3833 was not denominated a Rule 60(b) motion. But, since it followed final judgment[2] and was not within the time limits of Rule 59(e),

[1]Gould argues that her motion was proper because, under 28 U.S.C. § 1447(c), the district court may remand any time before final judgment if it finds that removal was improvidently granted. Her argument is frivolous.

[2]Her previous appeal was from the district court's final judgment. Raising a remand motion after the appeal is taken cannot be before final judgment as required in Section 1447(c).

we may consider it a Rule 60(b) motion. *Rodriguez v. Southern Pacific Transportation Co.*, 587 F.2d 980, 981 (9th Cir. 1978). It follows that since she did not follow the proper procedure to request a remand from this court, we might dismiss the appeal as interlocutory. Gould's motion in her independent action is admittedly pursuant to Rule 60(b). If the rules noted above apply, the decision on appeal in No. 85-4163 would also be unappealable.

[3] Although language in the cited cases supports the proposition that the district court never regains jurisdiction in the absence of a remand, the better approach is that the district court may consider motions to vacate once the mandate has issued.

The Supreme Court approved this procedure in *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976). The Court recognized that requiring appellate leave for the district court's consideration of Rule 60(b) motions is often inefficient and that the district court may better recognize a frivolous motion. *Id.* at 18-19. We agree and adopt the rule that, once the appellate mandate has issued, leave of this court is not required for district court consideration of a Rule 60(b) motion.

[4] The Court had denied certiorari by the time the district court ruled on the motion. *Standard Oil* applies to preclude the necessity of seeking leave of the Supreme Court. *See id.* at 17 n.1 ("mandate" incorrect but useful); S. Ct. R. 52.3 (no formal mandate from Supreme Court to federal courts). Thus, Gould need not have applied to this court or the Supreme Court for either a remand or a recall of mandate in order for the district court to have had jurisdiction to consider the motion and the independent action.

II. *Removal Jurisdiction and the Voluntary/Involuntary Rule*

[5] Gould contends that the district court improperly denied her remand motion made immediately after MONY

removed the action. As an initial matter, she is right. Removal jurisdiction is statutory and strictly construed. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)); *Self v. General Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978). Federal courts look only to a plaintiff's pleadings to determine removability. *Self*, 588 F.2d at 655.

When an action is removed based on diversity, complete diversity must exist at removal. *Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985). This rule "parallels the rule in federal question cases where a federal question must exist at the time the petition for removal is filed." *Id.* (citing *Libhart*, 592 F.2d at 1065). Diversity is generally determined from the face of the complaint. *Id.*

In *Self v. General Motors*, we discussed the rule that only a voluntary act by a plaintiff could create diversity removal jurisdiction where none existed from the complaint. *See id.* at 657-60. The rule does not allow creation of diversity removal jurisdiction by court order dismissing the nondiverse defendant, *id.* at 660, even if state appeals of the dismissal were complete, *id.* at 658.

[6] Under this analysis, the district court erred in denying Gould's remand motion because dismissal of the two Washington attorneys was not voluntary. If she had pressed an interlocutory appeal, we could have ordered the district court to remand.

III. *Removal Jurisdiction after Final Judgment*

[7] Because Gould did not take an interlocutory appeal of the denial of her remand motion, however, the issue is subject to a different test. In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16 (1951), the Court recognized that a district court judgment may be upheld, even if initial removal was improper. If the district court "would have had original juris-

diction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of judgment," then the estoppel that applies to prevent a party from raising the removal errors does not "endow [the court] with a jurisdiction it could not possess." *Id.* at 16-17.

The Court reaffirmed this rule in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702-06 (1972). This circuit applies *Grubbs* and *American Fire* even where the final judgment is by summary judgment. *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 427 (9th Cir. 1983); *Stone v. Stone*, 632 F.2d 740, 742 (9th Cir. 1980) (citing cases), *cert. denied*, 453 U.S. 922 (1981). *But see Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1066 (9th Cir. 1979) (exception only applies to trial on the merits, not summary judgment).

In *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983), we applied *Grubbs* to a situation similar to this. When final judgment was entered, only a diverse defendant remained because the nondiverse defendants had been dismissed by summary judgment. *See id.* at 551-52. Applying *Grubbs*, we found that diversity jurisdiction existed at entry of final judgment. *Id.*

Essentially, the rule requires an appellant to have a remand issue certified for interlocutory review. Otherwise an appellant will bear the risk that subject matter jurisdiction will exist at final judgment, and she will be deemed to have waived the issue. *See Sheeran v. General Electric Co.*, 593 F.2d 93, 97-98 (9th Cir.) (discussing rule), *cert. denied*, 444 U.S. 868 (1979); *see also Alligator Co., Inc. v. La Chemise Lacoste*, 421 U.S. 937, 938-39 (1975) (three justices dissenting from denial of certiorari) (jurisdictional questions should be raised at the first opportunity).

Under the *Grubbs/American Fire* rule, the court below had subject matter jurisdiction. The nondiverse defendants had been dismissed by the state trial court and that dismissal had

not yet been overturned on appeal. The only parties before the court were diverse. Although application of this rule puts an appellant to a choice, it promotes finality and judicial efficiency as does 28 U.S.C. § 1447(d), which prohibits appellate review of a district court's grant of a remand motion.

IV. *Res Judicata and Law of the Case Doctrines' Effect on an Attack for Lack of Subject Matter Jurisdiction of the Court's Judgment*

[8] MONY asserts that, regardless of our analysis of the *Grubbs/American Fire* rule, Gould should be barred by res judicata or collateral estoppel from relitigating the question of the district court's subject matter jurisdiction. Gould counters with the argument that, since her attack is direct, not collateral, the district court should have examined the issues anew.

The Supreme Court has said that lower federal courts, while of limited jurisdiction, have the authority to determine their own jurisdiction. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375-76 (1940). "Their determinations of such questions, while open to direct review, may not be assailed collaterally." *Id.*

In *Watts v. Pinckney*, 752 F.2d 406 (9th Cir. 1985), we held that a district court is "compelled to exercise its authority under Rule 60(b)(4) to vacate" judgments in which it had erroneously asserted its own jurisdiction. *Id.* at 410. The court had entered judgment against Pinckney and the United States. On the government's appeal, we ruled that the district court did not have subject matter jurisdiction over the claim against Pinckney. *Id.* at 407-08. Pinckney, however, was not a party to the appeal. *Id.* at 407. When he moved under Rule 60(b)(4) to have the judgment vacated as void for lack of jurisdiction, the district court granted it and we affirmed. *Id.* at 406, 410.

Watts, however, differs on its facts and does not control. In *Watts*, we had held, on the initial appeal, that the judgment against Pinckney was entered without jurisdiction. In Gould's initial appeal, we considered, albeit on a petition for rehearing and suggestion for rehearing en banc, whether the district court lacked subject matter jurisdiction and rejected the contention by denying rehearing.

[9] "Under the law of the case doctrine 'a decision of a legal issue or issues by an appellate court . . . must be followed in all subsequent proceedings in the same case . . . unless the evidence on a subsequent trial [is] substantially different . . . .'" *Pubali Bank v. City National Bank*, 777 F.2d 1340, 1342 (9th Cir. 1985) (quoting *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 834 (9th Cir. 1982)). Gould has shown nothing to justify the district court's ignoring the implication, arising from the denial of rehearing, that it was bound by this determination that its exercise of jurisdiction was proper. We affirm its denial of Gould's motion and dismissal of her independent action as the law of the case.

CONCLUSION

Ninth Circuit law requires the conclusion that, unless the case is remanded, a district court does not regain jurisdiction after a notice of appeal is filed. The Supreme Court has approved of a better procedure. Thereunder, a district court may decide postjudgment motions without leave of the appellate court, once the appellate mandate has issued. We follow that procedure, holding that the court had jurisdiction to consider Gould's motions.

The district court erred initially when it denied Gould's remand motion. But, the test on appeal of a final judgment is not whether removal was proper but whether the court would have had jurisdiction of the case in the posture it had at the time final judgment was entered. The error does not void its judgment. The court would have had original jurisdiction of

the case had it been filed in the posture it had as of final judgment because the only parties before it were diverse.

Moreover, even if the district court found error in our affirming its subject matter jurisdiction when we denied Gould's rehearing petition, it would have been bound, not by res judicata principles, but by the law of the case.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRIET M. GOULD, an unremarried widow,	)	JUL 17 1986
Plaintiff-Appellant,	)	Nos. 85-3833 85-4163
vs.	)	
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a foreign corporation,	)	DC Nos. CV 84-230R CV 85-837M
Defendant-Appellee.	)	O R D E R

Before: WRIGHT and ANDERSON, Circuit Judges, and CROCKER,* Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Anderson has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. F. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* Of the Eastern District of California

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HARRIET M. GOULD, an unremarried widow,	)	
Plaintiff,	)	NO. C82-230R
v.	)	ORDER DENYING MOTION FOR REMAND
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a foreign corporation,	)	
Defendant.	)	

PLAINTIFF has filed a motion for remand in the above-entitled case. This matter was removed from the jurisdiction of this court by the filing of plaintiff's notice of appeal.

NOW, THEREFORE, IT IS ORDERED as follows:

The court lacks jurisdiction to hear plaintiff's motion for remand. Said motion is hereby DENIED.

The Clerk of the Court is directed to forward copies of this Order to counsel

of record.

DATED at Seattle, Washington this 17th day of April, 1985.

/S/ Barbara Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HARRIET M. GOULD,	)	
	)	
Plaintiff,	)	NO. C85-0837
	)	
vs.	)	ORDER OF DISMISSAL
	)	
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	)	
	)	
Defendant.	)	
	)	

THIS MATTER having come on before this Court on defendant's Motion for Dismissal Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), and the Court having reviewed defendant's Memorandum in Support, and the exhibits attached thereto, comprising the record of the United States District Court for the Western District of Washington Cause No. C82-230R, entitled Harriet M. Gould v. Mutual Life Insurance Company of New York, and the record of that

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case before the Ninth Circuit and the Supreme Court of the United States, and the Court having determined that:

1. This Court lacks subject matter jurisdiction over the claims brought in plaintiff's Complaint, and

2. Plaintiff has failed to state a claim upon which relief can be granted, and

3. Plaintiff's claims in this cause are barred by the doctrines of res judicata and/or collateral estoppel; now, therefore,

IT IS ORDERED that plaintiff's Complaint be and is hereby DISMISSED, with prejudice and with costs awarded in favor of defendant and against plaintiff.

DATED this 29th day of August, 1985.

/S/ Walter T. McGovern
JUDGE WALTER T. McGOVERN

PRESENTED BY:
SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

By /S/ Robert Kraft
ROBERT M. KRAFT
Attorneys for Defendant

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§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judg-

ment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a

judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

RESPONDENT MUTUAL LIFE INSURANCE COMPANY OF NEW YORK'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

QUESTION PRESENTED

Whether "special and important reasons" exist which would warrant the granting of this Petition for Writ of Certiorari?

II.

PARTIES

Harriet M. Gould, petitioner, a Washington citizen; Mutual Life Insurance Company of New York (hereinafter referred to as MONY), respondent, a New York corporation. All subsidiaries are wholly owned. The affiliates are as follows:
MONY REAL ESTATE INVESTORS;
MONY SERIES FUND, INC.
There is no parent corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-655

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

RESPONDENT MUTUAL LIFE INSURANCE COMPANY OF NEW YORK'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mutual Life Insurance Company of New York (hereinafter MONY) respectfully submits this response to petitioner Harriet M. Gould's Petition for a Writ of Certiorari to Review the Decision and Judgment of the United States Court of Appeals for the Ninth Circuit, 790 F.2d 769 (9th Cir. 1986).

I.

STATUTES

28 U.S.C. §1332(a):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000,

exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(e) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. 1441:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if

sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

28 U.S.C. § 1446:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleadings setting forth the claim for relief upon which such action or proceeding is based, or within thirty

days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleadings, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist as the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may b filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition on behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements in curred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendant share in actual custody on process issued by the State court, the

district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

II.

STATEMENT OF THE CASE

Respondent MONY accepts and adopts the statement of the case submitted by the Ninth Circuit at 790 F.2d at 771. (See pages A-4 and A-5 of Appendix to Petition for Writ of Certiorari.

There is no dispute that petitioner was at all times material a resident of the state of Washington, that respondent MONY is a New York corporation, and that petitioner's claim exceeds $10,000.00, exclusive of interest and costs. Had petitioner originally brought her claim against MONY in the United States District Court, that court would have had subject matter jurisdiction. 28 U.S.C. §1332(a). Upon respondent MONY's filing its petition for removal pursuant to 28 U.S.C §1441 and §1446, the District Court thereupon took jurisdiction of petitioner's claim against respondent MONY. In her petition for writ of certiorari, petitioner identifies the marital communities of both Mr. Israel and Mr. Bailey as parties to the federal action. Defendants Israel and Baily have at no time been parties to this action in the federal courts, and the Court should not be misled by petitioner's attempts to create a diversity question through their inclusion in the identification of parties contained in the petition.

III.

THIS PETITION FOR WRIT OF CERTIORARI FAILS TO SET FORTH ANY SPECIAL AND IMPORTANT REASONS AS LISTED IN SUPREME COURT RULE 17

Supreme Court Rule 17 sets forth the considerations governing review on a petition for writ of certiorari. That rules states:

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of fed-

eral law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition for writ of certiorari at bar fails to state the manner in which the decision of the Ninth Circuit was in any way in conflict with another federal court of appeals, a state court of last resort, or has departed so far from the accepted and usual course of judicial proceeding or so far sanctioned such a departure as to call for the exercise of this Court's power of supervision. Nor does the petition set forth any manner in which the Ninth Circuit decision decides an important question of federal law which has not been settled by this Court, or decides any federal question in a way in conflict with an applicable decision of this Court.

Respondent MONY addresses the eight theories petitioner cites upon which she contends warrants this Court's granting of the petition for writ of certiorari. Respondent MONY respectfully submits that as there is no special or important reason for granting the writ of certiorari, the petitioner should be denied.

A. The Ninth Circuit Followed the Accepted Rule that the Federal Courts Look Only to Plaintiff's Pleadings to Determine Removability.

Petitioner's Ninth Circuit Theory No. 1 suggests that the Ninth Circuit created a new rule that a "[s]tate court involuntary dismissal of non-diverse defendants changes the posture of the complaint. . ." (Petition, p. 9). The basis of this assertion comes from Petitioner's contention that the district court improp-

erly denied her motion to remand. With respect to this contention, the Ninth Circuit agreed with petitioner, stating:

> As an initial matter, she is right, removal jurisdiction is statutory and strictly construed. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L.Ed. 1214 (1941)); *Self v. General Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978). Federal courts look only to a plaintiff's pleadings to determine removability. *Self*, 588 F.2d at 655.

Gould v. Mutual Life Insurance Co. of New York, supra at 773.

As the Ninth Circuit accepted petitioner's contention in this regard, petitioner cannot be heard to say that the Ninth Circuit departed from the usual and accepted course of judicial proceedings.

B. Where No Interlocutory Appeal of a Denial of a Motion for Remand is Taken, the Issue is Subject to the Test Set forth in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16, 71 S. Ct. 534, 541, 95 L.Ed. 702 (1951).

Petitioner's second theory is that the Ninth Circuit required an interlocutory appeal following denial of motion to remand for the setting aside of a void judgment. The Ninth Circuit stated that where no interlocutory appeal is taken, the district judgment may be upheld, even if initial removal was improper, if the the district court "would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or at the entry of judgment". *American Fire & Casualty Co. v. Finn*,

341 U.S.C. 16, 71 S. Ct. 534, 541 (1951). See also, *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702-06, 92 S. Ct. 1344, 1347-49, 31 L.Ed.2d 612 (1972).

The Ninth Circuit correctly followed the rule in *American Fire* and *Grubbs*, and did not depart from the usual and accepted courts of judicial proceedings.

C. The Ninth Circuit Property Followed the Rules Stated In the American Fire and Grubbs Cases.

Petitioner's Theory Nos. 3 through 7 deal with the question of the district court's jurisdiction to adjudicate petitioner's claim against the nonresident defendant MONY. Although the Ninth Circuit found that the district court originally erred in denying petitioner's motion for remand, it correctly concluded that under the *American Fire/Grubbs* rule, the district court had subject matter jurisdiction over petitioner's claims against MONY. Although subject matter jurisdiction may not be waived, a litigant who participates in a district court proceeding may be deemed to have waived any irregularity of removal proceedings. *Harris v. Edward Hyman Co.*, 664 F.2d 943, 945 (5th Cir. 1981); *see* also *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970) cert. denied 91 S. Ct. 460, 400 U.S. 933, 27 L.Ed.2d 441 (1970).

D. The Doctrines of Res Judicata and the Law of the Case Precluded Petitioner's Attack on the District Court and Ninth Circuit Judgment.

The issue of subject matter jurisdiction was litigated and decided adversely to the petitioner at the district court and Ninth Circuit level. The Ninth Circuit correctly determined that:

> [U]nder the law of the case doctrine 'a decision of a legal issue or issues by an appellate court. . .

> must be followed in all subsequent proceedings in the same case. . . unless the evidence on a subsequent trial [is] substantially different. . .'

Gould v. Mutual Life Insurance of New York, 790 F.2d at 774. The doctrines of res judicata and law of the case apply to questions of subject matter jurisdiction. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L.Ed. 104 (1938); *see also, Underwriters Nat'l Ass. v. N.C. Life & Acc., Etc.*, 455 U.S. 691, 706, 707, 102 S. Ct. 1357, 1367, 71 L.Ed.2d 55 (1982); *Durfee v. Duke*, 375 U.S. 106, 84 S. Ct. 242, 245, 246 (1963); *Yanow v. Weyerhaeuser Steamship Co.*, 274 F.2d 274, 277 (9th Cir. 1958).

No important federal question exists in this regard which should be decided by this court.

IV.

CONCLUSION

The instant Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit fails to present any special and important reason, as set forth in Supreme Court Rule 17, warranting review by this Court. On the basis of the foregoing, respondent Mutual Life Insurance of New York respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Respondent,

and

ROBERT L. ISRAEL, et. ux. and
C. WILLIAM BAILEY, et. ux.,

Defendants.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY TO MONY'S BRIEF

Need to Examine the Record:

MONY's Brief not only refuses to identify the non-diverse defendants (Israel and Bailey) on page i but argues on page 6 that they were never parties to this action. No statute grants federal subject matter jurisdiction in this case, therefore if federal jurisdiction exists, it must rest on the complaint alleging complete diversity between plaintiff and all defendants. To prove to this Court that the complaint removed to the District Court did not allege the requisite complete diversity, the clerk of the Circuit Court has been requested to certify the record to this Court pursuant to Rule 19. That clerk refuses to comply with Rule 19 of this Court.[1] However, petitioner's allegation of joint liability of diverse and non-diverse defendants in a single non-severable cause of action is

[1] See copies of correspondence in the files of the clerk of this Court.

documented in the Court of Appeals' opinion as well as the Washington Appellate Court opinion[2] reversing the dismissal of the non-diverse defendants. The summary of the allegations of the complaint in both those opinions show that the complete diversity between plaintiff and all defendants required by §1332(a) and 1441(b) is lacking. Since diversity to support federal jurisdiction cannot be created by waiver nor by the refusal of both the Circuit and District Courts to consider the lack of federal jurisdiction, the judgment under this direct attack is void.

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[2] 37 Wn.App. 756, 638 P.2d 207 (1984)

Reply to Rule 17 Argument:

As will be pointed out herein, the Writ should be granted for one or both of the following Rule 17 reasons:

(a) The Federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

(b) The Federal Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court.

The Change of Posture Theory is not Supported by the Record:

There has been no change in the posture of this case since it was filed in the state court.

Posture at time of Removal:

Plaintiff had perfected her appeal from the state court dismissal on the merits of the non-diverse defendants to the state Court of Appeals. Under the decisions of this

Court such posture did not create the complete diversity required to support federal jurisdiction.[3] The Court of Appeals admits that the District Court should have remanded for lack of federal jurisdiction.

Posture at Time of Judgment:

No change. Plaintiff's appeal to the state Court of Appeals was still pending. Under the decisions of this Court in footnote 3 an appeal from the dismissal would not be necessary to prevent removal for want of jurisdiction.

Posture at Time of Argument to Court of Appeals on First Appeal:

No change.

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[3] Whitcomb v. Smithson, 175 U.S. 635, 637; 20 S.Ct. 248, 48 L.Ed. 203; Kansas City Suburban Belt Ry. Co. v. Herman, 187 U.S. 65, 23 S.Ct. 24, 47 L.Ed. 76; Alabama Great Southern Ry. Co. v. Thompson, 200 U.S. 206, 26 S.Ct. 161, 50 L.Ed. 441; Lathrop v. Int. Const. & Imp. Co., 215 U.S. 246, 30 S.Ct. 76; 54 L.Ed. 177; Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 13; American Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 35 S.Ct. 335, 59 L.Ed. 594.

Posture at Time Court of Appeals Rendered Its Opinion on First Appeal:

State Court of Appeals had reversed the dismissal of the non-diverse defendants. The Court of Appeals was notified of that decision over a month before rendering its decision.[4] Plaintiff then had a valid suit against the non-diverse defendants in the state court, but due to the unlawful and unusual removal of the diverse defendant, cannot proceed against that defendant. Likewise, plaintiff could not collaterally attack the federal court judgment in the state court to avoid the doctrines of collateral estoppel and res judicata. The only relief available to plaintiff is a direct attack, as presented by this case, to set aside the void federal court judgment.

[4] Court of Appeals failed to give the state Court of Appeals' decision full faith and credit.

Posture Today:

No change. Plaintiff has not voluntarily dismissed the non-diverse defendants. The judgment in the federal court is therefore void for want of jurisdiction.

The Court of Appeals justifies its results by calling its dereliction of duty to search the record for federal jurisdiction[5] in the first appeal the "law of the case". If that theory is the law, then no Rule 60 independent suit could ever prevail, as every unlawful action of the Court theretofore would be the law of the case. In effect, the Court of Appeals has repealed Rule 60.

These points prove the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and has decided a federal question in con-

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[5] All federal courts have been required to sua sponte search the record for federal jurisdiction at least since Mansfield v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), over 100 years ago.

flict with the applicable decisions of this Court. The Writ should be granted.

RESPECTFULLY SUBMITTED,

Dated: 11/17/86

/s/ Vaughn E. Evans

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